Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION

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EXECUTTIVE SUMMARY

Over a series of Commission decisions and judicial rulings, the Commission now approaches again the question of how the provision of broadband internet access services should be addressed. Various avenues have been explored for more than a decade, with policies grounded in various and varying Titles and sections of the Communications Act. NTCA submits that several touchstones must guide the Commission as it investigates the most effective way to ensure the further deployment and use of broadband throughout the Nation: universal service, consumer protection, and the ability of small providers to access middle mile, backbone and other points throughout the network are all critical aspects of this current consideration. Policies to further these goals must further recognize the many actors on the broadband stage, as well as the different "layers" in the internet, and ensure that no single segment of the industry is slated for regulatory oversight while others are unconstrained. At the same time, NTCA submits that regulatory policy in this arena is most effectively implemented as a "light touch" regulatory backstop, existing to ensure that the market's operations ensue in a manner that enables and promotes the universal service, consumer protection, and network access goals noted above.

Several episodes from the past offer counsel as the Commission approaches this proceeding. The need for a regulatory backstop can be discerned from rural call completion, which suffered until the Commission applied regulatory intervention to ensure that the market met its obligation to maintain connectivity to rural areas. On another side of the spectrum, the Commission's prior efforts to apply Section 222 of the Communications Act to broadband internet access service resulted in inequitable and disparate regulation, failing to recognize the role of many actors upon the broadband stage.

In many proceedings and statements of the Commission and its leadership, a clear vision of ubiquitous broadband deployment throughout the Nation has been articulated. This deployment will be fostered by proper regulatory processes, and should encourage adoption that produces positive outcomes for health care, education, and economic development. The outcome of any reclassification should have no bearing on necessary universal service fund contribution reform. Finally, small providers should continue their ability to offer the transmission components of their broadband service as a Title II service.

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TO THE COMMISSION:

I. INTRODUCTION.

NTCA–The Rural Broadband Association (NTCA)[1] hereby submits these comments in response to the Notice of Proposed Rulemaking released on May 23, 2017, in the above-captioned proceeding.[2] The *NPRM* seeks comment on proposed rules by which the Federal Communications Commission (Commission) can promote a free and open Internet through light-touch regulatory policies.

Over a series of Commission decisions and judicial rulings, the Commission now approaches again the question of how the provision of broadband internet access services should be addressed. Various avenues have been explored for more than a decade, with policies grounded in various and varying Titles and sections of the Communications Act. NTCA submits that several touchstones must guide the Commission as it investigates the most effective way to

[1] NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full service rural local exchange carriers and broadband providers, and many provide fixed and mobile wireless, video, satellite and other competitive services in rural America as well.

[2] *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (*NPRM*).

ensure the further deployment and use of broadband throughout the Nation: universal service, consumer protection, and the ability of small providers to access middle mile, backbone and other points throughout the network are all critical aspects of this current consideration. Policies to further these goals must further recognize the many actors on the broadband stage, as well as the different "layers" in the internet, and ensure that no single segment of the industry is slated for regulatory oversight while others are unconstrained. At the same time, NTCA submits that regulatory policy in this arena is most effectively implemented as a "light touch" regulatory backstop, existing to ensure that the market's operations ensue in a manner so as to enable and promote the universal service, consumer protection, and network access goals noted above.

II. A "LIGHT-TOUCH" REGULATORY FRAMEWORK IS APPROPRIATE IN LIGHT OF THE DYNAMIC, MULTI-SIDED NATURE OF THE "ONLINE MARKETPLACE" – BUT A REGULATORY "BACKSTOP" THAT RESTS UPON A SOUND LEGAL FOUNDATION REMAINS ESSENTIAL TO ACHIEVE IMPORTANT PUBLIC POLICY OBJECTIVES.

A. A Limited and Targeted Regulatory Backstop Remains Essential to Ensure a Free and Open Internet

NTCA has long publicly supported a "light-touch" regulatory framework that takes accurate account of the multi-sided nature of an online marketplace where "last mile" or retail Internet Service Providers (ISPs), other network operators, and other entities that offer services and content all play critical differing roles in delivering upon consumer expectations and demands with respect to the use of broadband services.[3] Although some in the past have urged

[3] *See, e.g.*, Comments of NTCA, GN Docket No. 14-28 (filed July 18, 2014) (*NTCA 2014 Comments*), at 6-7; Reply Comments of NTCA, GN Docket No. 14-28 (filed Sept. 15, 2014), at 9-10; *see also* "Basic Rules of the Road Are Needed to Protect an Open Internet," Shirley Bloomfield, Morning Consult (June 8, 2017) (available at: https://morningconsult.com/opinions/basic-rules-road-needed-protect-open-internet/).

(or even adopted) a uniquely unjustified focus on only one part of the online ecosystem – the "last mile" ISPs – to the perplexing exclusion and protection of other actors and operators,[4] this is in fact a dynamic environment in which different parties may be able to exercise leverage over other marketplace participants based upon factors such as enterprise size, customer characteristics, and geographies served. In the end, the fact is that parties of all kinds can possess the ability in a given circumstance to enhance or undermine the successful operation of the other participants in this marketplace and their ability to serve consumers.[5] Indeed, interconnecting "middle mile" networks, transit and peering service providers, content delivery networks (CDNs), and content and edge providers all have just as much, if not more, incentive and ability in certain cases to disrupt the consumer experience in favor of their own service or content, or to make that experience more costly through high rates charged to smaller, rural ISPs for transport or transit, for example.

For these reasons, even as NTCA previously supported potential regulation based upon Title II, it favored a very *different* Title II regime than the Commission ultimately adopted and implemented. NTCA specifically and expressly opposed a heavy-handed regulatory framework that looked to subject last-mile ISPs –and *only* such operators – to ill-fitting legacy regulations.[6] Instead, NTCA has long supported a clearly defined regulatory framework that does not interfere

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[4] *Protecting and Promoting the Open Internet: Report and Order on Remand, Declaratory Ruling, and Order*, Docket No. 14-28, 30 FCC Rcd 5601, 5757, at para. 382 (2015) (*2015 Open Internet Order*).

[5] As one notable example, a dispute between content provider Viacom and certain cable providers over *traditional video content* reportedly led Viacom to block access to otherwise free and available *online content* for the broadband subscribers of at least some cable companies. "Viacom Dispute: Small Cableco Customers Can't Access Free Web Content," Telecompetitor (May 7, 2014) (available at: http://www.telecompetitor.com/viacom-dispute-small-cableco-customers-cant-access-free-web-content/).

[6] *See, generally*, NTCA 2014 Comments.

ex ante with this dynamic and diverse marketplace but is available nonetheless as a "backstop" to ensure that consumer expectations are neither undermined nor defied as a result of disputes or disagreements between underlying operators and service providers. As NTCA has noted previously, this is particularly important for consumers served by smaller or rural ISPs, since these providers possess little, if any, bargaining power in negotiating the terms of interconnection and data or content exchange with larger network operators, edge providers and CDNs.[7]

For example, a push by larger providers for limited interconnection points spread out across wider geographic areas[8] could impose significant costs on rural ISPs and, by extension, rural consumers and businesses in defiance of universal service goals.[9] More specifically, universal service cannot be fulfilled in a "market" that compels all network operators, large and small, to bear the costs of reaching distant, centralized interconnection points that may be dozens or hundreds of miles from a given rural service area. Such interconnection arrangements may work well if one has a nationwide footprint. For a small operator serving several thousand consumers in rural New Mexico or Texas, however, the costs of interconnecting with other operators in Dallas or Los Angeles can be cost-prohibitive, making the services delivered to the small company's customers similarly cost-prohibitive, as well. This result defies a core universal

[7] *Id*. at 4-5.

[8] *See, e.g., Ex Parte* Letter from Brian Benison, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Commission, GN Docket No. 13-5, *et al*. (dated Jan. 24, 2014), at Presentation Slide 11 (showing 5 to 8 interconnection points total nationwide as the model for both Tier 1 IP voice and peering interconnection).

[9] It is also worth observing that centralized interconnection might also present security and public safety risks than dispersed network interconnection points that by their nature provide greater redundancy and fewer individualized potential points of failure.

service principle that all parties and policymakers tout in considering any reforms or rewrites. Indeed, AT&T – one of the largest nationwide providers – has emphasized that, even in an IP world, transport networks are hardly "cost-free."[10] This observation is especially important when considering the situation of smaller providers that have but a few thousand consumers across whom to spread such costs. Universal service simply cannot and will not be served in the absence of rules that ensure interconnection nearer to the rural and remote markets they serve.

Therefore, a framework that promises a backstop to ensure reasonable terms to govern the exchange of increasing amounts of data over IP networks is just as, if not more, important as it was a century ago when policymakers encouraged the Kingsbury Commitment to keep rural areas connected. The carriage of traffic to these points will incur costs that will reflect the distance across which traffic is conveyed. Policy-makers will be confronted with the question of how those costs may be paid, and the implications on universal service, including reasonably comparable rates and affordability. NTCA does not suggest a specific solution, *per se*, but rather suggests that as an overarching principle, revision of the Commission's rules as they relate to broadband must recognize the primacy of interconnection and content/data exchange as a public policy goal. Another example of the potential benefits of a regulatory framework placed atop firm statutory footing can be discerned in the rural call completion context, where a perceived regulatory vacuum (particularly with respect to VoIP and least-cost routing practices) led to calls

[10] *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Protecting and Promoting the Open Internet: Ex Parte Presentation of AT&T*, Docket Nos. 10-90, 01-92, 14-28, attachment at 14, (filed Jul. 10, 2014); *see also* "Who Should Pay for Netflix?" Jim Cicconi, AT&T Public Policy Blog (Mar. 21, 2014) (available at http://www.attpublicpolicy.com/consumers-2/who-should-pay-for-netflix/).

failing to reach rural American consumers and businesses until the Commission could step in to provide the much-needed "backstop" that created proper incentives to complete calls.[11]

It was for reasons such as these that NTCA previously supported a *limited and targeted* Title II-based regulatory backstop. Hearkening back to the opinion of Justice Scalia in the *Brand X* decision, NTCA believed one possible logical and legally sound means to implement such a light-touch framework would be to view the transmission (or telecommunications) component of broadband as distinct from the information processing component.[12] Based upon such an analysis that took into account the "network layer" as compared to the "service or application layer" (a concept that is otherwise a rather commonplace and relatively noncontroversial view in the Internet ecosystem),[13] NTCA urged that *all* networks – whether last-mile, middle mile, transit, backbone, or CDN – be subject to the same "limited, targeted" regulation with respect to the routing, transmittal, and exchange of data between points based narrowly upon the authority

[11] The negative effects of the lack of clear "rules of the road" have been seen today in other important contexts. NTCA and its members have for several years now reported an alarming number of voice calls placed to rural areas that simply fail to complete. See, e.g., *Ex Parte* Letter from Shirley Bloomfield, Chief Executive Officer, NTCA, to Hon. Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, *et al*. (filed Sept. 20, 2011), at 2-3; *Ex Parte* Letter from Michael Romano, Counsel for NTCA, *et al*., to Theresa Z. Cavanaugh and Margaret Dailey, Investigations and Hearings Division, Enforcement Bureau, Commission (filed June 13, 2011); *Ex Parte* Letter from Jill Canfield to Marlene H. Dortch, Secretary, Commission, WC Docket No. 13-39 (filed Aug. 19, 2013), at 1-2. Although the Commission has taken action to attempt to get to the source of this problem, the problem's very existence and its persistence highlight the need for targeted, reasonable regulation to protect consumer expectations and promote universal service and public safety. Put another way, the rural call completion epidemic should be seen by policymakers as a "canary in a coal mine," showing the real-world risks that can arise in the absence of clear "rules of the road" in communications markets.

[12] *Nat'l. Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967, at 1013, 1014 (*dissent* at 4-5 (*Scalia dissenting, Souter and Ginsburg dissenting as to Part I*)) (2005).

[13] *See, e.g.*, https://en.wikipedia.org/wiki/OSI_model.

to regulate the underlying transmission function.[14] NTCA further argued that the Commission should then rely upon Section 706 of the Telecommunications Act of 1996 to adopt a basic and straightforward "no blocking" requirement that would apply with equal force to both network operators *and* others in the Internet ecosystem (such as content and edge providers).[15] The theory behind such a rule would have been that parties of all kinds have the incentive and ability to block content or access to applications in frustration of consumer demands,[16] and that any such conduct – in addition to denying the basic openness of the Internet – frustrates broadband deployment in contravention of Section 706.

Although based in Title II and Section 706, such a framework did not need to be – and, indeed, should not have been – (mis)applied in a heavy-handed manner and to only one subset of this broader and dynamic online marketplace. Instead, it could have been applied in a light-touch manner that would not have imposed arbitrary, selective *ex ante* regulation comparable to what ultimately flowed from the *2015 Open Internet Order*.[17] Put another way, such a framework

[14] NTCA 2014 Comments at 10-11; *see also* "A Third-Way Legal Framework for Addressing the Comcast Dilemma," Austin Schlick, General Counsel, Commission (May 6, 2010).

[15] NTCA 2014 Comments at 14-15.

[16] *See* footnote 5, *supra.*

[17] Among the gravest manifestations of the reclassification was the unprecedented expansion of privacy and data security obligations that were rooted in the application of Section 222 of the Communications Act (47 U.S.C. § 222) to broadband internet access service. These rules expanded both the universe of implicated information and those entities that would be subject to the Commission's requirements. For example, data that had formerly been carved out of customer proprietary network information (CPNI) requirements, such as subscriber list information (SLI), was considered protected information under the new rules. *See, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services: Report and Order*, Docket No. 16-106, 31 FCC Rcd 13911, at 13948, at para. 98, 13982, at footnote 499 (2016). These rules were eventually set aside by an act of Congress. Joint Resolution, Pub. L. No. 155-22 (2017) ("Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Federal Communications Commission relating to 'Protecting the Privacy of Customers of Broadband and Other

could and should have been applied to all marketplace participants equally as a true "backstop," not unlike perhaps how the Commission effectively "regulates" (*i.e.,* barely) the interstate, interexchange marketplace – a Title II-based regime that does little more than ensure at this point that "things don't go wrong."[18]

Unfortunately, what came from the *2015 Open Internet Order* took a materially different approach in exercising the powers asserted under Title II. In lieu of "regulatory humility" that would look only to create a "backstop," substantial new *ex ante* rules were created that imposed significant burdens and generated regulatory uncertainty. In lieu of taking a comprehensive, neutral look at which entities might have the incentive or ability to affect the goal of an "Open Internet," the order singled out retail ISPs as the only marketplace participant upon which burdens should fall. And, in lieu of considering the implications of interconnection from "both sides" of an interconnection point, the order imposed a one-sided interconnection duty upon last-mile ISPs – even though especially in rural areas, many ISPs are a tiny fraction of the size of upstream middle mile and transit networks or content and edge providers that enjoy vastly more bargaining power and capability to affect users' online experience.

NTCA recognizes that this prior one-sided, failed effort to achieve certain important public policy objectives related to Internet openness and freedom calls into question whether Title II is an effective or appropriate tool to promote such objectives without creating uncertainty

Telecommunications Services' (81 Fed. Reg. 87274 (December 2, 2016)), and such rule shall have no force or effect.").

[18] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended: Order on Reconsideration,* Docket No. 96-61, FCC 96-424 (1997) (reaffirming commitment to detariffing policies for most interstate long distance services).

or the prospect of regulatory overreach. The Commission is, of course, also exploring and seeking comment on whether broadband Internet access service should in the first instance even be considered a telecommunications service based upon the nature of the offering and Commission precedent. Based upon what came before, NTCA submits the Commission's efforts here are an important and useful exercise (even as NTCA submits that Congress is at this point likely best equipped and positioned to bring a clear and certain resolution to these issues). But, whatever the outcome of this latest exercise and examination, two important facts must not be lost: (1) there *are* several important public policy objectives with respect to broadband deployment and access that regulators are responsible to promote and achieve; and (2) those objectives must be achieved via a framework built upon a sound legal foundation.

B. Any Regulatory Backstop Must Aim to Protect Certain Important Public Policy Objectives – But the Backstop Must be Limited in Scope and Target Objectives that are Within the Core Competency and Communications Regulation Expertise of the Commission.

With respect to the public policy objectives that must be achieved to ensure a well-functioning online marketplace and promote broadband deployment and access, universal service is clearly important if rural America is to participate in today's communications marketplace. The Commission itself has repeatedly acknowledged that universal service remains an essential public policy objective in a broadband world.[19] Indeed, the Commission is specifically charged by statute with promoting universal service,[20] and it has taken many steps over the past decade to

[19] *See, e.g.*, "Bringing the Benefits of the Digital Age to all Americans," Remarks of Chairman Ajit Pai (March 15, 2017), at 4-5; "Federal Broadband Infrastructure Spending: Potential Pitfalls," Blog Post of Commissioner Michael O'Rielly (Feb. 1, 2017) (available at: https://www.fcc.gov/news-events/blog/2017/02/01/federal-broadband-infrastructure-spending-potential-pitfalls); Statement of Commissioner Mignon Clyburn, WC Docket No. 10-90, *et al*. (May 25, 2016).

[20] 47 U.S.C.§ 254.

attempt to reorient each of the universal service programs toward more explicit and direct support of broadband. The notion of universal service therefore should not be lost or forfeited even if broadband were not classified as a telecommunications service – but it is also clear that universal service cannot and will not be achieved (or certainly, sustained) as a practical matter in a regulatory vacuum. Rather, clear and consistent regulatory policies from the Commission are necessary to establish predictable and sufficient mechanisms that will promote universal service now and into the future. Fortunately, it is settled law that the Commission can (if it does so in the right way) promote the goals of universal service and provide high-cost universal service support under section 254 of the Act, even if broadband is not classified as a telecommunications service. Thus, any reclassification now should not disrupt those mechanisms.[21] Nevertheless, it will be important that the Commission neither abandon nor retreat from the notion of universal service as a result of reclassification, and to the contrary, the Commission should reaffirm its commitment to predictable, sufficient, and specific support of universal voice *and* broadband consistent with section 254.

[21] *In re FCC 11-161*, 753 F.3d 1015, at 1053, 1054 (upholding Commission determination pursuant to Section 254 to condition receipt of high-cost universal service support for telecommunications services upon deployment and provision of broadband services, despite classification of the latter as information services); *see also See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, et al*., CC Docket No. 96-45, *et al*., Fourteenth Report and Order, *et al*., 16 FCC Rcd 11244, 11323 (2001), at para. 200 ("[U]se of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services.") (footnote reference omitted).

As a related matter, no discussion of public policy priorities can transpire without discussion of consumer protection and the fulfillment of user expectations. The full breadth of the prior rules, including the catch-all Internet conduct standard and flat ban on individual negotiations (or "paid prioritization") were ineffective and unnecessary in NTCA's view to protect consumers – and if anything, they denied consumers the benefits of innovative service offerings and deterred provider creativity in responding to consumer demand. NTCA submits instead that basic mass-market consumer protection functions are better handled via the Federal Trade Commission than via an agency whose core competency and most significant expertise comes in the form of interstate communications regulation. The Commission can certainly be a resource to other entities to the extent that unique questions regarding communications policy might affect consumer protection matters and perhaps some limited disclosure (or "basic transparency") requirements from this Commission with respect to the unique, communications-specific characteristics of broadband as may be appropriate. But, otherwise and in the first instance, the policing of matters in the retail mass market is best left to agencies and entities that are either closer to the customer and/or more well-versed and practiced in the oversight of mass-market services, generally.

By contrast, and precisely because of its competency and expertise in interstate communications regulation, this Commission can and must play a central role in ensuring the seamless transmittal and exchange of data or content between users and across networks.[22] There is no single agency better prepared to address such concerns; if the Commission does not fill this void, quite candidly no other entity can or will. But, despite prior conclusions that regulation in

[22] 47 U.S.C. § 151.

this regard should fall squarely and solely upon retail ISPs,[23] the fact is that interconnection disputes and/or failures *across* the ecosystem can and may in the future frustrate, if not defeat, the goals of an open Internet.[24] Although in the first instance it would seem appropriate to let the marketplace seek to self-regulate these concerns with respect to interconnection and data or content exchange in lieu of *ex ante* regulation, as the representative of entities that have experienced firsthand in a not dissimilar context the problems of consumers being "cut off" from the rest of the world,[25] NTCA submits that a regulatory backstop remains essential to ensure proper incentives to interconnect and exchange data, along with some capability for the regulator to step in if needed to correct for unreasonable and/or discriminatory behavior.

Indeed, the notion of a regulatory "backstop" with respect to interconnection and exchange of data or content should be seen as both a starting point *and* a finish line. Rather than maintain a catch-all "Internet Conduct Rule" that looks to far-reaching "non-exhaustive" factors

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[23] *See, e.g., 2015 Open Internet Order*, at paras. 28-31.

[24] *See* footnote 5, *supra.* Indeed, policymakers have started to recognize that last-mile or retail ISPs are far from the only parties that can affect or otherwise utilize data transmitted across networks and received or sent by users, and that a more comprehensive view is warranted as to which types of entities can affect consumers in an online environment. By way of example, the "Balancing the Rights of Web Surfers Equally and Responsibly Act of 2017" (BROWSER) would require both ISPs and *other internet companies* to be subject in equal measure to the Federal Trade Commission (FTC). This is a significant departure from the Commission's prior attempt to regulate only ISPs and their protection of customer data. Whereas under the Commission's prior rules (since set aside by CRA action) applied only to ISPs, the BROWSER Act would apply to both internet providers and the web firms. *See,* H.R.2520 - BROWSER Act of 2017115th Congress (2017-2018). This corresponds with NTCA's long-standing calls for a consistent form of regulation across all actors in the broadband space, including as to privacy regulation. *See, e.g., Protecting the Privacy of Customers of Broadband and Other Telecommunications Services: Comments of NTCA-The Rural Broadband Association,* Docket No. 16-106, at 4, 5 (May 27, 2016).

[25] *See, e.g., Rural Call Completion*, WC Docket No. 13-39, Second Further Notice of Proposed Rulemaking (rel. July 14, 2017) (*Rural Call Completion Second Further NPRM*), at paras. 2-9.

as justification for pronouncements that might impose new prohibitions on certain practices, NTCA agrees with the proposal in the *NPRM* to eliminate this far-ranging rule and the associated list of factors.[26] Nonetheless, the need for some "rules of the road" is clear. Rural call (in)completion, unfortunately, has become a standard, albeit effective, example of how problems left untended can spiral out of control. And, yet, even as it is being re-examined to some degree,[27] the Commission's response to a problem that emerged in an unbounded environment has proven effective. Where the natural structure of the market does not provide natural incentives to adhere to fair and reasonable practices, some regulatory backstop is a logical and legally sound solution – and a necessity.

Indeed, although one would expect the existence of adequate incentives to ensure suitable access to these networks across all layers of the internet, conflicting incentives among providers and/or operators may result in instances in which interconnection is not assured. Commission action in the form of a regulatory backstop can help avoid those pitfalls. As discussed below, the Commission need not invoke a mandatory tariffing or prescriptive pricing regime; it should be enough to implement a structure in which voluntary negotiations among the parties within the bounds of fair and reasonable treatment can be undertaken, but within view of assistive regulatory intervention should those discussions be unable to produce a fair and reasonable result. This type of "backstop" is especially important for smaller providers that lack bargaining or market power when negotiating with larger entities.

[26] *NPRM* at paras. 72-75 and n. 169.

[27] *See, generally, Rural Call Completion Second Further NPRM.*

With this in mind, NTCA therefore does not concur with the proposal in the *NPRM* not to adopt any alternatives to the Internet Conduct standard.[28] Without some regulatory backstop, as discussed above, the result would appear to be a regulatory vacuum – and in that vacuum, it is unclear what happens if, for example, interconnection or data exchange disputes hinder or even render broadband services unusable in contravention of important public policy objectives such as those noted above. While a bright-line "no blocking" rule of the kind that the Commission appears to support would perhaps address the most egregious examples that could arise,[29] it would not cover the breadth of potential concerns that might arise in the context of interconnecting networks. Taking rural call completion as an example again, absolute blocking is not always the issue – in many instances, calls have gone through but with garbled voice or false rings.[30] In other cases, an operator did not itself affirmatively block calls, but handed them off to others without care or concern as to whether downstream providers might do so.[31] A strict "no blocking" rule would not have captured all such concerns or allowed the Commission to address them; nor would other laws or regulations aimed at curbing "collusion" have proven effective in addressing such concerns.[32]

For this reason, it is essential to adopt a regulatory "backstop" framework that: (a) prohibits conduct in the interconnection and exchange of data and content between any entity in

[28] *NPRM* at para. 75.

[29] *Id*. at para. 80.

[30] *See, Rural Call Completion: Report and Order and Further Notice of Proposed Rulemaking,* Docket No. 13-39, 28 FCC Rcd 16154, 16155 (n.1),16162 (para. 14), 16201 para. 111 (2013).

[31] *See, e.g., id.* at 16176 (para. 42).

[32] *NPRM* at para. 84.

the broadband marketplace that undermines broadband deployment; and (b) enables the Commission to step in and resolve disputes or disagreements that may arise between networks and other operators consistent with a prohibition on such conduct. If the Commission neither asserts nor retains any authority whatsoever to step in when disputes or disagreements arise between interconnecting parties, this will frustrate, if not defeat, the goals of a free and open Internet and deter, rather than encourage, broadband investment – particularly in rural America where it is harder to justify broadband deployment and where smaller providers and their customers know too well unfortunately what it means to be "cut off" from the rest of the world from a communications perspective.

C. If Broadband is Not a Telecommunications Service, Then Section 706 Offers the Most Sound Legal Foundation for a Limited and Targeted Regulatory Backstop.

The second important factor to consider, of course, is the legal foundation for whatever regulatory framework the Commission might ultimately adopt. The many court decisions over the years chart paths that can lead toward or away from Title II regulation, based upon what the Commission finds to be the proper classification of broadband Internet access service.[33] Across all of these opinions, however, perhaps the most important and relevant touchstones for purposes of charting a legally sustainable path forward from this point are the conclusions in *Verizon* that: (1) Section 706 can be read to grant the Commission authority to regulate broadband providers; but (2) the Commission may subject an entity to common carrier regulations "only to the extent that it is engaged in providing telecommunications services."[34] In *Verizon*, relying primarily in

[33] *See generally Nat'l Cable & Telecoms. Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005); *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *United States Telecom Assn. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

[34] *Verizon*, 740 F.3d at 650 (citations omitted).

turn upon analysis from *Midwest Video II*,[35] the court found that the specific "Open Internet" rules adopted by the Commission, even if technically within its authority under Section 706, could not be distinguished from common carrier regulations and thus ran afoul of the prohibition referenced above.[36]

Thus, if broadband is classified as an information service, the Commission can only adopt any rules governing broadband pursuant to Section 706 to the extent that those rules are distinct from traditional common carrier regulation. Although in the preceding section, NTCA advocates for a regulatory "backstop" that would prohibit certain kinds of conduct, this framework need not and should not be applied in the same manner as common carrier regulation. Put another way, a prohibition on conduct that violates Section 706's mandate to encourage broadband deployment need not equate, for example, to "unjust and unreasonable practices" regulation under Section 201 of the Act or a prohibition on "unreasonable discrimination" under Section 202.[37] Indeed if, as the *Verizon* decision suggests, one distinguishing characteristic from common carrier regulation is "considerable flexibility" in establishing and maintaining relationships with customers,[38] this can and should be the case under the backstop proposed herein. There is no need for strict prescription as to the terms and conditions of interconnection and content/data exchange, nor any specific *ex ante* regulation of such practices; rather, the marketplace should be left to function itself in the first instance and permit "individualized

[35] *Id*. at 652 (citing *Midwest Video v FCC,* 440 U.S. 689, at 706) (1979).

[36] *See, i.e., id*. at 650.

[37] 47 U.S.C. §§ 201, 202.

[38] *Verizon*, 740 F.3d at 657, *citing Cellco Partnership v. FCC,* 700 F.3d 534, at 548 (D.C. Cir. 2012).

decisions"[39] by operators of all kinds. But, the Commission must then retain the authority and ability to assert itself if and when disputes or disagreements arise that hinder the goals of Section 706 and thus harm the public interest. Moreover, unlike common carrier regulations that turn upon the carrier-customer (or potential customer) relationship, the backstop that NTCA proposes does not and should not turn upon contractual (or potential) privity between any given set of parties. Instead, the simpler question would be whether a particular act or omission in connection with the interconnection and exchange of data or content, regardless of any contracts between the parties involved, has an adverse impact upon broadband deployment in contravention of Section 706.

At least until Congress speaks more directly to such questions and prescribes specific standards in terms of permitted or prohibited conduct in the broadband marketplace, the Commission should utilize the authority conferred by Section 706 as confirmed by the *Verizon* decision to establish a regulatory "backstop" that confers flexibility but prohibits conduct by any entity contrary to the broadband deployment goals of Section 706.

III. OTHER UNIVERSAL SERVICE IMPLICATIONS

A. THE COMMISSION SHOULD CONFIRM THAT OPERATORS WILL RETAIN THE ABILITY TO OFFER BROADBAND INTERNET TRANSMISSION SERVICES UNDER TITLE II AS A VOLUNTARY MATTER.

In 2005, the Commission ruled that broadband internet access was an information service, but at the same time permitted facilities-based wireline carriers to offer the transmission component of broadband internet access services on either a common carrier or non-common

[39] C*f. id*. at 651, *citing National Association of Regulatory Utility Commissioners v. FCC,* 525 F.2d 630, at 641 (D.C. Cir. 1976).

carrier basis.[40] More specifically, operators choosing to offer broadband transmission on a common carriage basis could do so under tariff. When broadband was reclassified as a common carrier service in 2015, the Commission indicated that ISPs were prohibited from tariffing broadband internet access services,[41] although wireline carriers were permitted to continue tariffing their broadband transmission services.[42]

In 2016, the Commission recognized that rate-of-return carriers may offer broadband-only loops through their interstate special access tariffs as an input to wireline broadband internet access services, and permitted carriers to begin charging a CBOL charge for consumer broadband-only loop services.[43] The Order also permitted carriers to offer such consumer services on a detariffed basis,[44] but did not otherwise modify RLECs' ability to provide broadband internet access transmission services on a common carriage basis. In short, the Commission's current universal service mechanisms presuppose and depend upon the continuing ability of hundreds of small carriers to offer broadband transmission on a regulated basis.

The current *NPRM* proposes, among other things, to restore the prior Title I information service classification for broadband internet access service offerings, and asks what effects removing Title II classification will have on the provisions of the Act from which the

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[40] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, et al.*: *Report and Order and Notice of Proposed Rulemaking* WC Docket No. 02-33, *et al*., 20 FCC Rcd 14853, 14928 (2005), at para. 138 (*2005 Classification Order).*

[41] *2015 Open Internet Order* at para. 382.

[42] *See id*. at n. 1377.

[43] *Connect America Fund, et al.,* WC Docket No. 10-90, *et al*., 31 FCC Rcd 3087, 3120-23 (2016), at paras. 86-91.

[44] *Id*. at n. 163.

Commission forbore in the *2015 Open Internet Order*.[45] NTCA submits that the broadband transmission services currently offered by RLECs under tariff differ substantially from the broadband internet access services primarily at issue in this proceeding. Consistent with past practice and to avoid further regulatory disruption with respect to universal service mechanisms that are already grappling with significant levels of uncertainty, the Commission should confirm in any Order adopted in the wake of the instant *NPRM* that RLECs will continue to have the ability to offer broadband internet transmission services under Title II, either pursuant to tariff or on a non-tariffed basis.

The Commission also inquires in the *NPRM* as a related matter what additional forbearance measures might be necessary in connection with any conclusions it might ultimately reach.[46] NTCA observes that one such proposed measure is already pending before the Commission in the form of a petition for forbearance filed recently by NTCA and USTelecom.[47] As that petition explains, while providing RLECs with the voluntary ability to tariff broadband transmission is an important mechanical component of universal service, the maintenance of USF contribution obligations for the select class of providers that offers broadband in this manner is disparate and anti-consumer. NTCA therefore remains eager to see the Commission promptly address the forbearance questions raised in the petition, either directly in response to that petition or through this proceeding.

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[45] *NPRM* at paras. 64-65.

[46] *Id*.

[47] *Petition of NTCA-The Rural Broadband Association and the United States Telecom Association for Targeted, Temporary Forbearance Pursuant to 47 U.S.C. §160(c) from Application of Contributions Obligations on Broadband Internet Access Transmission Services Pending Universal Service Fund Comprehensive Contributions Reform,* Docket No. 06-122 (filed June 14, 2017).

B. PUBLIC POLICY AND THE LAW SUPPORT THE INCLUSION OF BROADBAND IN THE LIFELINE PROGRAM

The Commission proposes to maintain support for the Lifeline program if broadband internet access service is reclassified as an information service. The Commission explains that in 2011, it found that "[s]ection 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered," and "allows [the Commission] to . . . require carriers receiving federal universal service to invest in modern broadband-capable networks."[48] In the instant *NPRM*, the Commission proposes to continue its requirement that carriers receiving Lifeline support use that funding to provide broadband. NTCA supports this proposal.

From a policy perspective, NTCA has long been a champion of ensuring, consistent with statutory mandates, that "access to advanced telecommunications and information services should be provided in all regions of the Nation."[49] These services underpin the ability of consumers in those areas, "including low-income consumers,"[50] to enjoy access to "advanced telecommunications and information services"[51] that enable critical health care, educational, and economic development opportunities. NTCA members offer examples of how broadband has helped lower-income users in rural America. In Georgia, in a community where the median

[48] *NPRM* at para. 68; *see also In re FCC 11-161*, 753 F.3d 1015, at 1053, 1054 (upholding Commission determination pursuant to Section 254 to condition receipt of *high-cost* universal service support for telecommunications services upon deployment and provision of broadband services, despite classification of the latter as information services).

[49] 47 U.S.C. § 254(b)(2).

[50] *Id.* at § 254(b)(3).

[51] *Id.* at § 254(b)(3).

income is $15,000 below the National average, broadband powers a connected health cart in a school nurse's office, enabling students to connect to a regional medical center more than 50 miles away so that doctors can see and hear children who in all likelihood would not have an opportunity to visit a doctor.[52] In McKee, Kentucky, fiber is set to support an innovative pilot that will bring telehealth services to our Nation's veterans. Peoples Rural Telephone Cooperative and the Veterans Administration (V.A.) recently signed a Memorandum of Understanding to commence a pilot initiative in which veterans will be able to access V.A. telehealth and other on-line services at no cost to the veterans or the V.A. The NTCA-led "Virtual Living Room/VALOR"[SM] initiative will bring together capable broadband network operators with public organizations to meet the health care needs of U.S. veterans.[53]

Broadband-enabled benefits like those described above are particularly critical in low-income areas. In the Georgia community described above, the distance from a regional health center is compounded by the difficulty that parents in that low-income region would face when taking time off from work. Parents concerned by the prospect of lost wages or in jobs that do not offer sufficient flexibility face challenging decisions. The connected health cart alleviates both health care *and* income concerns by enabling students, in coordination with the school nurse, to access physicians at a regional medical center 50 miles away.

The pressing challenges of poverty affect adults, as well, and in particular U.S. veterans. The Veterans Administration has an established telehealth program that can help bridge the gap

[52] *See,* "ComSouth Earns 2016 Smart Rural Community Award," Houston Home Journal, Houston County, Georgia, p.8A (Oct. 12, 2016).

[53] *See,* Sparks, Jerry, and Abner, Carmen, "PRTC Partners with VA and Public Library to Bring Nation's First Virtual Living Room Telemedicine to Local Veterans," Jackson County Sun, p.1 (Jun. 28, 2017).

of distance from medical facilities,[54] and the V.A. also houses an Office of Rural Health that is designed to "increase access to care for the 3 million Veterans living in rural communities who rely on V.A. for health care."[55] However, no matter the extent or effectiveness of telemedicine services, financial barriers to broadband adoption can frustrate the goals of the V.A. programs. The U.S. Census Bureau reports about 5 million, or 24.1 percent, of U.S. veterans 18 years and older live in rural areas. The poverty level for all rural veterans was 6.9 percent between 2011 and 2015, but that rate increased to 8.6 percent for veterans in "completely rural counties." Employment rates for rural veterans are lower than both rural non-veterans and urban veterans.[56] These conditions can be alleviated in some measure by innovative programs such as the NTCA Virtual Living Room/VALOR[SM] program, but the effectiveness of telehealth is increased when users can adopt and access services at their homes. Including broadband in Lifeline increases the opportunities for lower-income Americans, whether students in Georgia or veterans in Appalachia, to access beneficial telehealth services.

Broadband can also open economic opportunities. A rural broadband provider in Alaska has observed:

> We are in a prime position now with the infrastructure we are deploying. The worldwide web creates a virtual environment that really is global. It doesn't matter anymore where you are located physically.
>
> We have a business headquartered in Palmer, Alaska . . .. They are a global business, with offices everywhere. They said they have the best connectivity in Palmer of all their locations around the world. They are transferring terabytes of

[54] *See, generally,* www.telehealth.va.gov.

[55] *See,* www.ruralhealth.va.gov.

[56] *See,* "Nearly One-Quarter of Veterans Live in Rural Areas, Census Bureau Reports," United States Census Bureau, Release Number CB17-15 (Jan. 25, 2017) (https://www.census.gov/newsroom/press-releases/2017/cb17-15.html).

> data all over the place, and can do work no matter where they are because of that connectivity.
>
> So, broadband opens all kinds of new possibilities. What matters are the types of services you have available that allow the people, the entrepreneurs, in your area to really take advantage of that.[57]

Enabling telecommuting via rural broadband is a promise for many. Lifeline broadband can be an "on-ramp" to well-earning jobs that can ultimately enable the user to leave the Lifeline program.

Lifeline-supported broadband can open doors to improved health care, economic opportunities, and educational resources. Many of these benefits are realized with home usage that is supported by Lifeline funding. The Commission has full legal authority to pursue policies that fulfill these goals. As noted above, the Communications Act directs policies that ensure "access to advanced telecommunications and information services . . . in all regions of the Nation,"[58] "including low-income consumers."[59] Accordingly, the Commission should retain Lifeline as a supported service.

C. THE RECLASSIFICATION OF BROADBAND SHOULD HAVE NO IMPACT ON THE PURSUIT OF COMPREHENSIVE CONTRIBUTIONS REFORM.

The reclassification of broadband as an information service should have no impact on efforts to expand the contributions base for the universal service fund. The broader distribution of contributions responsibility among industry participants whose businesses rely on ubiquitous

[57] "Building the Virtual Metropolis," Michael Burke, Matanuska Telephone Association, NTCA Annual Meeting, San Diego (panel presentation, Feb. 6, 2017).

[58] 47 U.S.C. § 254(b)(2).

[59] *Id*. at § 254(b)(3).

broadband is critical to reduce the individual contribution rate that applies to carriers and their customers, and can be an avenue to further deployment of broadband throughout the Nation.

Universal service contributions policies are grounded in Section 254(d) of the Communications Act. Section 254(d) provides that "every telecommunications carrier that provides interstate telecommunications services shall contribution, on an equitable and nondiscriminatory basis . . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." Although classification as a telecommunications service would mandate contributions under this statute based upon provision of broadband (in the absence of forbearance), the Commission retains sufficient (and indeed, ample) authority based upon this section, and others, to include broadband services revenues in an expanded, revenue-based contribution reform.

Specifically, section 254(d) confers upon the Commission authority to require a provider of "interstate telecommunications" to contribute to the USF. "Telecommunications" is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[60] Telecommunications is inarguably a component of broadband internet access service.

[60] *Id*. at § 153(50). This is distinguished from ""Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effective available directly to the public, regardless of the facilities used." *See id*. at § 153(53).

The Commission reaffirmed this in 2006, finding that broadband providers "provide" telecommunications since such inputs are part of the larger broadband offering.[61] This articulation came in the context of a ruling that interconnected VoIP is telecommunications and should be required to contribute to universal service, even as the Commission did not reach the question of whether interconnected VoIP is a Title II *telecommunications service* or a Title I *information service.* Accordingly, the VoIP decision contemplates that a service can provide "telecommunications" *regardless* of whether the service itself is telecommunications service or an information service. Broadband internet access service, upon which VoIP relies, includes "telecommunications." Like the Commission's ruling, this is true regardless of whether broadband internet access service is classified as a Title I information service or a Title II telecommunications service. As such, providers of broadband internet access service provide "telecommunications," and therefore fit squarely within the authority of Section 254(d) which permits the Commission to require "[a]ny . . . provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service if the public interest so requires."

There is no doubt that the public interest supports measures that will speed deployment of broadband throughout the Nation. The Chairman's Broadband Deployment Advisory Council is but one example of the emphasis that the Commission has placed upon ensuring the greater deployment of broadband. The welcoming of broadband into the contributions regime – the notion that if we as a nation are supporting universal broadband, users of such networks must contribute to their well-being – can and *should* be initiated *regardless* of the Title I or Title II

[61] *See, e.g., Universal Service Contribution Methodology, et. al: Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 06-122, *et. al.*, 21 FCC Rcd 7158, 7180 (para. 41), 7188 (para. 30) (2006).

classification of broadband, and would be a logical and lawful manifestation of the Commission's commitment to broadband. The alternative, to rely upon the present system of tapping a shrinking pool of revenues in a manner that only increases contribution rates, is antithetical to the oft-stated goals in which the Commission is invested deeply.

Even if the Commission declines to rely upon Section 254(d), Title I and Section 1 of the Communications Act provide adequate authority for the Commission to include broadband internet access services within the family of USF contributors. In 1988, before Section 254(d) was enacted, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's reliance on Title I and Section I to create the universal service program. The Court explained, "[a]s the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority."[62]

Therefore, and for the reasons stated above, the ultimate disposition of this instant proceeding should have no impact on the Commission's ability to undertake USF contributions reform that includes revenues of broadband internet service providers.

IV. CONCLUSION

WHEREFORE the reasons stated herein and above, NTCA urges the Commission to ensure that universal service, consumer protection, and the ability of small providers to access middle mile, backbone and other points throughout the network endure as the Commission addresses the regulatory classification of broadband internet access services. The Commission,

[62] *Rural Telephone Coalition v. FCC,* 838 F.2d 1307 (D.C. Cir. 1988).

as demonstrated above, has ample legal authority and policy justification to effect a "light touch" regime that nonetheless offers the safety of a regulatory backstop if market conditions deem its invocation appropriate. The Commission must recognize the many actors on the broadband stage, as well as the different "layers" in the internet, and ensure that no single segment of the industry is slated for regulatory oversight while others are unconstrained. An effective combination of "light touch" regulation, coupled with attentive oversight and a holistic view of the internet marketplace should promote not only deployment and adoption, but also their resultant benefits through the Nation.

Respectfully submitted,

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